

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

KAAPA ETHANOL, LLC,)	
)	
Appellant,)	Case No. 07C-051
)	
v.)	DECISION AND ORDER
)	AFFIRMING THE DECISION OF
KEARNEY COUNTY BOARD OF)	THE KEARNEY COUNTY BOARD OF
EQUALIZATION,)	EQUALIZATION
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by KAAPA Ethanol, LLC ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on March 3, 2009, pursuant to an Order for Hearing and Notice of Hearing issued December 17, 2008. Commissioners Wickersham, Warnes, Salmon, and Hotz were present. Commissioner Wickersham was the presiding hearing officer.

Charles Woodside, the chief executive officer of KAAPA Ethanol, LLC, was present at the hearing. Daniel L. Lindstrom and William E. Peters appeared as legal counsel for the Taxpayer.

David G. Wondra, County Attorney for Kearney County, Nebraska, was present as legal counsel for the Kearney County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-

5018 (Cum. Supp. 2006). The final decision and order of the Commission in this case is as follows.

**I.
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2007.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2007.

**II.
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Kearney County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lots 1-4, Golden Energy Addition, Minden, Kearney County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$2,094,865.00	\$449,980.00	\$2,094,865.00
Improvement	\$42,965,490.00	\$17,262,985.00	\$42,965,490.00
Total	\$45,060,355.00	\$17,712,965.00	\$45,060,355.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on December 17, 2008, set a hearing of the appeal for March 3, 2009, at 9:00 a.m. CST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

8. Actual value of the subject property as of the assessment date for the tax year 2007 is:

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Land value	\$ 2,094,865.00
Improvement value	<u>\$42,965,490.00</u>
Total value	<u>\$45,060,355.00.</u>

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Supp. 2007).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).

4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
8. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623, (1999).
9. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).
10. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v.*

Lincoln County Bd. of Equal., 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).

11. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
12. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
13. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).
14. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
15. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that

action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).

16. The presumption disappears if there is competent evidence to the contrary. *Id.*
17. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
18. Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
19. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
20. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
21. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
22. A corporate officer or other representative of an entity, must be shown to be familiar with the property in question and have a knowledge of values generally in the vicinity to be

qualified to offer an opinion of value. *Kohl's Dept. Stores v. Douglas County Bd. of Equal.*, 10 Neb.App. 809, 638 N.W.2d, 881 (2002).

23. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
24. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
25. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981); *Arenson v. Cedar County*, 212 Neb. 62, 321 N.W.2d 427 (1982) (determination of equalized taxable value) *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

IV. ANALYSIS

The subject property is an improved parcel with commercial use as a plant for the production of ethanol. The improvements on the parcel are numerous and include an office building with a basement, a vacant residence, scales, concrete silos, a processing building, boiler

building, storage tanks, railroad track, a fire safety building, a fermentation building, a cook building, a grain handling building, and items which the Taxpayer characterizes as "processing equipment." "Processing equipment" as characterized by the Taxpayer includes boilers, fermentation tanks, and all other items which are not clearly buildings in a production line beginning with the hammermill and ending at the tanks used for storage of the finished product.

An appraiser for the Taxpayer ("Taxpayer's Appraiser") testified that in his opinion actual value of the subject property as of January 1, 2007, was \$17,949,000. The opinion of the Taxpayer's Appraiser was supported by an appraisal report received as Exhibit 2. The opinion of value given by the Taxpayer's Appraiser did not include any value that might be attributed to "processing equipment," which he characterized as personal property not subject to valuation as real property. The list the Taxpayer's Appraiser considered to be processing equipment is found in Exhibit A of the Addenda to his appraisal report. The Taxpayer's Appraiser testified that he relied on the work of another appraiser for characterization of the items described as "processing equipment." The criteria used by the other appraiser to characterize the items as "processing equipment" is unknown. The first question for consideration is whether the "processing equipment" is personal property valued and assessed as personal property or fixtures valued and assessed as a part of real estate.

The Nebraska Legislature has adopted a statute defining "trade fixtures" and directing the taxation of "trade fixtures" as personal property. See, 2007 Neb. Laws, LB 334, §§13 and 14. "Trade fixtures" as defined by the Legislature could include all of the items considered to be "processing equipment" at the subject property. The Legislature's definition of trade fixtures became effective July 1, 2007. The assessment date for this proceeding is January 1, 2007. The

provisions of LB 334 do not affect characterization of the personal property or fixtures described in this appeal.

Whether an item is a fixture or removable personalty may depend on the relationship of the parties, i.e. landlord/tenant, vendor/vendee, mortgagee/mortgagor or other creditor. See, *The Fixtures Doctrine; Was It Ever Really the Law?*, Ronald W. Polston, Whittier Law Review, (1995). In this appeal the parties with differing points of reference are the Taxpayer and the County Board and the issue is the determination of whether an item is a fixture and taxable as real property. All real property is subject to taxation unless exempted. *Neb. Const*, Art VIII §§ 1 and 2. As of January 1, 2007, real property as defined in statute included land, buildings, and fixtures. *Neb. Rev. Stat. §77-103* (Reissue 2003). Fixtures are those items of property that have become a part of real property. Whether an item of property has become a part of real property is determined by consideration of three factors: (1) Whether the item is actually annexed to real property or something appurtenant to real property, (2) Appropriation of the item to the use or purposes of that part of the realty with which it is connected, and (3) The intention of the party making the annexation to make the item a permanent accession to the freehold. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989). The three-factor analysis stated in *Northern Natural* is restated in rules and regulations promulgated by the Property Tax Administrator. 350 Neb. Admin. Code, ch 10, §001.01A (05/05). The three-factor analysis is also described and analyzed in Directive 06-02 issued by the Property Tax Administrator.

A witness for the Taxpayer, qualified and acting as an appraiser for the State of Nebraska Property Assessment Division of the Department of Revenue, (“State Appraiser”) testified that

he had used the three-factor test to determine that property like the items described under the heading processing equipment, catwalks, grain handling equipment, stroke/ram vac for heat exchangers, and diesel tank including containment as shown in Exhibit 9 pages 32 & 33 were personal property. The State Appraiser stated his conclusion that items used as “processing equipment” were all personal property. The State Appraiser considered all items used in a processing sequence that begins with grinding of corn in a hammermill, includes fermentation of the ground corn for the production of alcohol, and ends with the storage after addition of a denaturing chemical to be “processing equipment” and therefore personal property. The State Appraiser testified that he believed his conclusion that “processing equipment” was personal property was a conclusion also reached by other county assessors. The State Appraiser also testified that in his opinion items of “processing equipment” would be modified or replaced over time because of changes in technology and normal wear and tear. The State Appraiser indicated that occasionally “processing equipment” of one ethanol plant was sold to another producer or moved. The State Appraiser testified that two identical items used for the removal of grain from a pit to an elevated conveyor belt “legs” were characterized in one instance as a fixture to real property and in another as processing equipment. Both items were on foundations and affixed to the ground with bolts, and both items lifted material from a pit to a conveyor belt. The only differences appear to be where they were located in the plant, the material lifted, and whether the State Appraiser believed they functioned as part of the processing sequence. The State Appraiser testified that if the boilers shown in Exhibit 2 at page 45 were in an office building or apartment building that he would consider them to be fixtures. The State Appraiser also testified that because the boilers were used to produce heat for a fermentation process he considered them to

be “processing equipment” and therefore personal property. In the same vein the Taxpayer’s Appraiser testified that the cooling towers shown on page 47 of Exhibit 2 would be considered fixtures if associated with an office building or apartment complex but had been characterized as personal property for purposes of his appraisal because they functioned as part of the fermentation process and were therefore processing equipment. The opinions of the State Appraiser and Taxpayer’s Appraiser are seemingly based on a belief that the function of an item determines its characterization as a fixture taxable as real property or as personal property to be taxed separately. The Taxpayer’s Appraiser also testified that another appraiser who was a recognized expert in the valuation of ethanol plants would consider the “processing equipment” to be fixtures. The basis for that view is unknown. Whether function is a consideration in the determination of the characterization of an item as a fixture taxable as real property or as personal property to be taxed separately is a question of law rather than appraisal practice.

The three-factor test described in *Northern Natural* and the rules and regulations of the Property Tax Administrator requires consideration of the following: (1) Whether the item is actually annexed to real property or something appurtenant to real property, (2) Appropriation of the item to the use or purposes of that part of the realty with which it is connected, and (3) The intention of the party making the annexation to make the item a permanent accession to the freehold. *Northern Natural Gas Co. v. State Bd. of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989).

There is evidence that the “processing equipment” is annexed to real property. There is evidence that “processing equipment” is appropriated to the use of the realty to which it is connected. The intent of the Taxpayer to make a permanent annexation to the freehold is

inferred from the scale, complexity, integration of functions, and apparent permanence of the improvements as a whole. Clearly, removal of the “processing equipment” would leave other improvements such as the grain receiving silos, processed ethanol storage tanks, processing building, cook building, grain handling building, fermentation building, truck scales, cooling tower foundation, foundations for various items of “processing equipment,” pump building, boiler building, and grain receiving building without purpose and with limited utility. Many authorities hold that any and all machinery essential to the proper functioning of a plant, mill, or similar manufacture is a fixture or is presumed to be a fixture regardless of the manner by which it is annexed to the realty. *35A Am. Jur. 2d, Fixtures §89 (2007)*. The fact that various items may be replaced as technology changes or ordinary wear and tear dictates replacement, or that a plant may be sold and moved does not support a finding that the Taxpayer intends something other than a permanent annexation of the “processing equipment” to the freehold.

The Commission finds that various items of “processing equipment” which the Taxpayer asserts are personal property are in fact fixtures taxable as real property. The opinion of actual value for the subject property given by the Taxpayer’s Appraiser cannot be relied on because it excluded from consideration all value that might be attributed to the "processing equipment."

An appraiser retained by the County Assessor (“County Assessor’s Appraiser”) testifying on behalf of the County Board acknowledged that when he made an inspection of the subject property in July of 2006, he observed construction activity. The Taxpayer's evidence shows that during the year 2006, production capacity of the ethanol plant on the subject property increased from 40 million gallons to 59 million gallons and that two buildings had additions and a new building was added. The County Assessor’s Appraiser either did not report his observations to

the County Assessor or the County Assessor did not act on his observations. It is clear from the evidence that the ethanol plant's value was determined for the tax year 2007 based on a production capacity of 40 million gallons when the true capacity on January 1, 2007, was 59 million gallons. The County Board's decision, which affirmed a value determined by the County Assessor's Appraiser, was unreasonable or arbitrary because it did not reflect the changes to the subject property shown in the Taxpayer's evidence and at least in part observed by the County Assessor's Appraiser.

The reasonableness of the valuation fixed by the County Board is one of fact based on all of the evidence presented. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001). A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value).

The opinion of value given by the Taxpayer's Appraiser clearly understates actual value because it excluded from consideration many items which the Commission has determined are fixtures to be assessed as part of the real estate.

The chief financial officer for the Taxpayer testified that an aggregate construction and acquisition cost of the real and personal property comprising the ethanol plant and its site was \$57,744,521.10. Various deductions for parcels not included in the subject property, vehicles, and software result in a calculated cost of the ethanol plant of \$57,391,141.20. (E9:52). The Commission has determined in Case No. 07P-002, heard in conjunction with this appeal, that the taxable value of the Taxpayer's taxable tangible personal property for the year 2007 is \$699,761.

Original cost of that personal property was \$1,143,577. If the construction and acquisition cost of the ethanol plant is further reduced for the cost of personal property the net is \$56,247,564.20 ($\$57,391,141.20 - \$1,143,577 = \$56,247,564.20$).

The State Appraiser testified that he had made a study of ethanol plants in Nebraska. Exhibit 11 page 1 is a spreadsheet showing some of the State Appraiser's findings. Among the findings is an indication that the cost of construction of an ethanol plant ranges from \$1.20 to \$1.47 per gallon of ethanol produced annually. (E11:1). If the subject property had been valued at \$1.20/gallon its value would be \$70,800,000 ($59,000,000 \times \$1.20 = \$70,800,000$). If the subject property had been valued at \$1.40 per gallon its value would be \$82,600,000.00 ($\$1.40 \times 59,000,000 = \$82,600,000$).

Cost is not, however, equivalent to value. See, *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2d 631, 637, (1998). The evidence of actual cost of construction is not a sufficient basis for a determination of actual value.

The Taxpayer operated the subject property at a \$45,162,893 profit for the year 2006. That profit alone is an insufficient basis on which to make a determination of actual value.

The State Appraiser testified that ethanol plants had been sold for \$1.35/gallon and \$1.40/gallon. Actual value of the subject property if determined on the basis of \$1.35/gallon would be \$79,650,000 ($\$1.35 \times 59,000,000 = \$79,650,000$). At \$1.40/gallon, actual value of the subject property would be \$82,600,000 ($\$1.40 \times 59,000,000 = \$82,600,000$). There is no evidence however on which to determine comparability of the sold ethanol plants to the subject property. The evidence is not sufficient to determine actual value based on sales of the two plants identified by the State Appraiser.

The Taxpayer asserts that taxable value of the subject property is not equalized with other similar parcels. There are no similar parcels in Kearney County. The Taxpayer operates the only ethanol plant in the County. The Taxpayer produced evidence that the general rule of thumb in two other counties is that property which is "process oriented" would be considered personal property. (E10:1). There were several operating ethanol plants in other counties. (E2:32). For reasons noted above the general rule of thumb stated is suspect. The evidence in this case is that the County Board properly characterized the real property of the Taxpayer for taxation. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959). The Taxpayer has not shown that actual value of the subject property is different than actual value as determined by the Board. The evidence is that the ratio of assessed to actual value of the subject property is 1. There is no evidence of the assessed value of other parcels similar to the subject property. Actual values of those parcels is unknown, however, and it cannot be determined that the ratio of taxable value to actual value of those parcels is lessor or greater than 1. The Taxpayer has failed to show that taxable value of the subject property when compared with the taxable value of similar property is grossly excessive.

Seemingly the position of the Taxpayer is that because parcels similar to the subject property have been valued on a different basis in other counties that the methods used in those

other counties must be used to determine actual value of the subject property. Uniformity of assessment does not require that result. A proper application of the law is not an improper valuation as a result of systematic will or failure of a plain legal duty nor is it an intentional violation of the essential principle of practical uniformity.

A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983). The Taxpayer has not met its burden of proof in this appeal.

V. CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary.
5. The Taxpayer has not met its burden to show taxable value of the subject property as of January 1, 2007.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2007, is affirmed.
2. Actual value, for the tax year 2007, of the subject property is:

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Land value \$ 2,094,865.00

Improvement value \$42,965,490.00

Total value \$45,060,355.00.

3. This decision, if no appeal is timely filed, shall be certified to the Kearney County Treasurer, and the Kearney County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.

7. This order is effective for purposes of appeal on June 25, 2009.

Signed and Sealed. June 25, 2009.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

I do not believe consideration of two standards of review is required by statute or case law.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. Id. The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887)). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, *Id.* In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.w.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. *Id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory

standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 *Creighton L. Rev.* 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner